No. 9473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 8

MARYLAND CASUALTY COMPANY
(a corporation),
Appellant,

vs.

MAZILLA TIGHE, AH CHONG and
LEONG CHEUNG,
Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Two briefs have been filed herein by appellees, one for the appellee Mazilla Tighe, and the other for the appellees Ah Chong and Leong Cheung. The brief on behalf of Ah Chong and Leong Cheung attempts to establish that the carriage of the goods after they were removed from the truck constituted "unloading", as was held by the trial judge; but the brief of Mazilla Tighe attempts to argue that the carriage of goods after unloading is covered by a recital in the policy defining transportation *or delivery* of goods to be commercial. This contention is new to us and was not the basis of the decision below, and we will therefore separately review these two briefs.

REVIEW OF BRIEF OF MAZILLA TIGHE.

1. Appellee states at the bottom of page 5 and the top of page 6 of her brief that the policy indemnified the insured against losses arising out of the *use* of the truck, and specifically defines "use to include not only *'unloading'* but also *'delivery'* of merchandise transported by the insured vehicle".

This is far from correct. What the policy in fact specifically provides is that it covers accidents "arising out of the ownership, maintenance, or use of the automobile" (R. p. 16), and that "use of the automobile for the purposes stated includes the loading and unloading thereof". (R. p. 15.)

2. Appellee relies on certain general "definitions" contained in the policy. The policy is so printed that it may be made applicable either where the automobile is used (a) for pleasure and business, or (b) for commercial use, and these terms are defined. This policy was for commercial use and the term "commercial" is defined therein "as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named insured's business occupation * * *" (R. p. 15.) This does not mean that the policy covers all transportation or delivery of goods in connection with insured's business, but the use of the truck for the transportation or delivery of goods. This is made clear by the provision for "coverage" which is limited to accidents "arising out of the ownership, maintenance or use of the automobile". (R. p. 16.) The words "transportation or delivery" are used because

the word "delivery" is better suited to goods sent out, while "transportation" is broad enough to include goods coming to the place of business. Neither word extends the policy to transportation or delivery *except by the automobile.* This is made clear by the express provision of the policy that "use of the automobile for the purposes stated [transportation or delivery] includes the loading and unloading thereof". (R. p. 15.)

Counsel again on page 6 of their brief say that "unless the phrase *'delivery of goods, merchandise or other material',* is utterly meaningless and nugatory, the policy, *by its express terms,* protects the insured against losses arising out of the unloading and delivery of merchandise, both of which are specifically defined herein as *uses* of the automobile". We see no call for this dilemma. One provision is that "transportation or delivery" is commercial. The other provision is that "loading and unloading" is a use of the truck. Of course, the use of the truck to transport or deliver goods is a use of the truck and no special provision to that effect was necessary. In referring to "transportation or delivery" the policy had no reference to a delivery after the goods had been unloaded, that is, a delivery made not by the use of the truck but by some other means. We submit, therefore, the sole question is, did the accident arise out of the unloading of the automobile? If counsel would meet this issue there would be no necessity to be troubled by "physical abstractions" (whatever they are) or "aura of mysticism".

3. On page 11 of the brief appellee charges us with a misstatement in stating that the trial judge neither cited nor relied upon any authority construing such a policy. We were referring to the opinion of the judge in the record which speaks for itself. (R. p. 56.)

4. On page 12 in attempting to distinguish the *Luchte* case counsel state: "Apparently no loading clause was involved, mere use, ownership and *intention*". We know of no case which has held that loading and unloading is not included in the use of the automobile. On the contrary, it is expressly held that without special provision to that effect loading and unloading is included. (*Panhandle Steel Products Co. v. Fidelity Union Casualty Co.*, 23 S. W. (2d) 799.) The decision in the *Luchte* case is based on the ground that the unloading was complete when the material was removed from the truck.

5. On page 13 they attempt to distinguish the *Morgan* case on the ground that the truck was not mentioned in the petition. The complaint of Tighe in this case did not need to refer to the truck. All she had to allege was that the defendants negligently ran into her. The liability of the insurer must depend on whether the facts established upon issues framed in the action on the policy bring the case within the policy.

6. On page 13 counsel apparently approve the *Stammer* case, but attempt to distinguish it on the time elapsing between the removal of the goods from the truck and the accident. If lifting the beer from the sidewalk, opening the hatchway and putting the

beer through the hatchway was included in "unloading", it would seem that leaving the trap open was incidental to the unloading,—certainly much more so than the alleged negligence of the boy in this case after both unloading and delivery were complete. The decision was in fact placed on the ground that the unloading was complete when the beer was taken off the truck and placed on the sidewalk.

7. On page 13 counsel apparently approve the *Armour* case where in making *delivery* the truck driver negligently left a hand truck in a dangerous place. Here again, if *delivery* was part of unloading, the leaving of the hand truck was incidental to the *delivery* and therefore to the unloading. The fact that the accident occurred later would not seem to be material. Counsel say "clearly no active delivery was involved". Certainly the use of the hand truck was part of the delivery much more than the return of the boy in this case.

8. As to the *Zurich* case, counsel stress the statement of the Court that the delivery man was "engaged in the servicing of delivered milk". What he was actually doing was making the delivery of milk and ice to the accustomed place, which was apparently the customer's icebox. Counsel say he was "servicing the icebox". He was servicing it by making the delivery of milk and ice to that point. It seems to us that if the carriage of goods to their final resting place by the operators of the truck is included in unloading, it is immaterial to what particular place on the customer's premises the delivery is made.

9. On page 15 counsel apparently approve cases which have denied a recovery even where the process of delivery was not complete, but as they say "the cause of the accident was but indirectly or incidentally related to the use of the vehicle or the unloading thereof, or where accident resulted from some act or circumstance entirely disconnected with such unloading". They apparently approve the holding in the *Franklin* case that the use of an elevator in making a delivery "had nothing whatever, in our opinion, to do with the 'use' of the teams or vehicles". So we say the skylarking actions of the boy after unloading and delivering articles had nothing to do with the use of the truck.

10. On page 16 they approve the holding in the *John Alt Furniture* case, where in *delivering* furniture a door was removed and caused an injury. Counsel deny the implication of our brief that the act which was the basis of the injury occurred before the unloading of all the furniture was complete. Certainly the very words which counsel quote prove that fact. After the door was removed the men carried furniture from the truck through the door for half an hour when the accident occurred.

11. Counsel apparently approve the decision in the *Jackson* case, but the decision in that case would have been otherwise if it was held that the goods were not unloaded until they were delivered. In that case the floor company backed the truck up to a loading platform and there unloaded the linoleum upon a small hand truck for complete delivery of the linoleum to a

designated place in the building, and while the linoleum was being carried by the hand truck to its final resting place the accident happened, and the basis of the decision was that the unloading was complete when the material was placed on the platform and the further act of carriage by the hand truck was no part of unloading. As we have pointed out, the fact that the carriage in the case at bar was by hand rather than by hand truck does not change the situation. The unloading was complete when the goods were removed from the truck.

12. Counsel refer to the *Panhandle* case. We only cited that case to point out that it was held that the use of the automobile included loading and unloading, even when the policy did not specifically so provide, and in support of our contention that, as a matter of fact, the provision regarding loading and unloading adds nothing to the policy.

13. We see no analogy between the case at bar and the *Merchants Co.* case cited on page 17. Any act necessary in the use and operation of the truck is covered by the policy, and we do not consider that the Court was liberal in its holding that the act in question was necessary. We have all done about the same thing. But as we have pointed out, the opening of the trap door, the running of the elevator, the removing of the door, the use of the hand truck were all reasonably necessary in making *delivery,* but were held not to be connected with the use of the truck or as any part of unloading.

14. We do not deem it proper to comment on the *Butte Brewing Company* case cited on page 19, as that decision is based entirely on the decision here under review. However, the act there involved was at least part of the *delivery;* here the act involved occurred after delivery had been made. In fact the Court there said:

> "We hold that under the facts presented the unloading of the truck was a continuous operation from the time the truck came to a stop and the transportation ceased *until the barrel of beer was delivered to the customer.*"

Even on this test the unloading ceased when the vegetables were delivered to the customer.

In the foregoing review we have not referred particularly to two cases cited in this brief:

The first is *Panhandle Steel Products Co. v. Fidelity Union Casualty Co.,* 23 S. W. (2d) 799 (Texas). In that case an injury occurred while a steel beam was being unloaded from the truck and one end of the beam was still on the truck at the time. It does not therefore seem to be in any way in point in this case.

The other case is *Park Saddle Horse Co. v. Royal Indemnity Company,* 81 Mont. 99, 261 P. 880. This was not an automobile case, and we do not consider that the case is at all in point. According to the statement of appellees, the policy insured against injury growing out of the use of saddle or pack horses, and saddle and pack horses were being used, but on account of the condition of the country "it was necessary to

cross dangerous and steep mountain sides and inclines and when so doing the tourists were required to dismount from the horses and to lead them. While so doing one of the parties slipped, caught her heel and fell, causing injury". We do not think that the case at bar would be aided one way or the other by a discussion of whether the horse was being used when the rider temporarily, on account of the condition of the country, dismounted and led the horse. However that may be, it might be noted that in an able article by John A. Appleman, published in Volume 25, American Bar Association Journal, page 302, that case is referred to as one of the decisions which "do not represent the usual doctrines but are merely freakish and wayward results; in many instances such result being the only out-of-line decision of courts which have constantly rendered excellent and well-reasoned opinions". The case is severely criticised in that article.

REVIEW OF BRIEF OF AH CHONG AND LEONG CHEUNG.

1. This brief correctly states the claim upon which the appellees must rely, namely, that the delivery and return from delivery is part of unloading. (p. 2.) They in no way rely upon the provision of the policy reciting that transportation or delivery of materials is commercial. They fail, however, to distinguish between the two claims made by appellant, namely, (1) that delivery is not part of unloading, and (2) that return from delivery is not part of unloading.

2. Appellees admit that there is no basis for the application of the rule referred to by the learned trial judge that an ambiguous policy is to be construed against the insured, because they state:

> "The words 'loading and unloading thereof' mean just exactly what they say, for they are too definite and specific to mean anything else."

Counsel ask if this policy did not cover this accident, what did it intend to insure against? The answer is clear. Motor vehicles kill or injure thousands of people every year and do untold damage to property. These accidents may happen when the vehicle is improperly parked. Or goods may fall from it and cause injury. Or an injury may arise from the removal of goods from a truck. So the policy was made broad enough to cover the use of the automobile including the loading and unloading of it. It was not a general public liability policy. Such a policy was open to the insured, insuring him for all injuries caused by his employee, or caused in the process of delivering goods. He got no such policy from appellant.

The insurer is not in any way bound by any arrangement, express or implied, between the insured and his customers. They cannot extend the liability beyond unloading by any arrangement by which the insured is to deliver or do any act after unloading. They might agree that the truck owner should, after unloading, carry the goods by hand, or by hand truck, or by elevator, or through chutes, through dark halls, into basements, up stairways, in elevators, or escala-

tors, into iceboxes, or refrigerators, and might even go further and require some degree of service, or packing, or storage of the unloaded material. None of these things would be covered by the policy.

Or the truck driver might incur some duty and liability *after the unloading* due to the manner in which such unloading was made or the place where the goods were unloaded. Thus, the duty to place lights on the goods if deposited on a street, would be a liability for breach of a public duty following unloading and would not be covered by the policy.

The multitudinous things which might happen in the course of such activities must necessarily come within public liability policies, workmen's compensation policies, or other like coverage, and cannot come within the coverage of a policy limited to the use, maintenance and operation of a truck, including the loading and unloading thereof. *Expressio unius, exclusio alterius* is the principle here applicable. If the parties had intended that carriage or other act after unloading was to be covered, they would have so provided.

If we follow the argument of counsel that words are to be given their popular and usual meaning, how can unloading be extended to include some carriage of the goods, not by the truck, but by hand, hand truck, elevator, or otherwise, *after they have been unloaded?*

The dictionary definitions of the verbs "load" and "unload" are in accordance with our argument and the cases we have cited as to the meaning of the

words "loading and unloading" as used in the policy. The words are defined as follows:

Webster's New International Dictionary, Second Edition, Unabridged, 1934:

load, verb.

"Transitive: 1. To lay a load or burden on or in, as on a horse or in a cart; * * *.

2. To place on or in something, as for carriage; as, to load a cargo of flour; to load hay."

unload, verb.

"Transitive; to take the load from; to discharge of a load or cargo; to disburden; as, to unload a ship; to unload a beast."

The New Century Dictionary:

load.

"1. tr. To put a load on or in (as, to load a beast of burden, a cart, or a vessel); * * * also, to place on or in something for conveyance (as, 'We * * * fetched our luggage and loaded it * * * into the canoes': DeFoe's 'Captain Singleton', v.); * * *."

unload.

"1. tr. To take the load from; remove the burden, cargo, or freight from; * * *."

3. On pages 8-9 counsel apparently approve the rule which they quote from the *Stammer* case, which seems to us to be clearly right and which also seems to show that where Leong Cheung took the goods off of the truck and plainly started on his course to deliver the produce by other power and forces inde-

pendent of the truck and the actual method of unloading, the truck may be said to be no longer in use.

4. On pages 9-10 in reviewing the *Jackson Floor Covering* case counsel distinguish between a delivery after unloading by mechanical means and a delivery by hand. We can see no difference. Nor does it matter that by express or implied arrangement between the insured and his customer the insured carries the goods after unloading, instead of the goods being carried by some third person. In most of the cases we have cited the carriage was by the insured, but such carriage after unloading was held to be not covered.

5. On page 13 counsel say we could not claim that carriage of goods after unloading is not covered by the policy. We do so claim, but also claim, as stated by counsel, that after both unloading and subsequent carriage are complete, the act of returning to the truck is not unloading.

6. Appellees have not cited any case supporting their right to recover. All that appellees have done is to criticize or attempt to distinguish the cases cited by us in which it was held that no recovery could be had. The only exception to this is the *Montana* case in which we claim the Court has erroneously followed the decision in the case at bar.

In this brief appellees incidentally refer to two cases which should be noted, the first being *Wheeler v. London, etc.,* 292 Pa. 156, 140 Atl. 855. In that case a steel beam was intended to be unloaded inside a garage.

However, it was unloaded so that it was partly on the sidewalk, and the party sent for a block and tackle, intending to use the insured truck for the purpose of lifting the girder into the garage. Under these circumstances the Court held that the truck was in use at the time. While we believe that a majority of the Court confused unloading and delivery, the peculiar situation growing out of the intended use of the truck entirely differentiates the case from the case at bar. It should also be noted that two judges dissented, in which they pointed out that the *previous* use of the truck and the *intended future* use were entirely immaterial.

The other case cited is *Caron v. American etc. Co.*, 277 Mass. 156, 178 N. E. 286. It is hard to understand why the appellees have specially referred to this case, because in that case it was held that the accident was not covered by the policy. In that case in unloading ice certain of the ice fell on the crosswalk and a pedestrian stepped on it and was injured. It was held that the ice having been removed from the truck, the injury did not arise out of the use of the truck. It should be noted that the Court also pointed out that the policy did not cover accidents growing out of delivery after the ice was removed from the truck. In fact, the case is one of the most extreme cases in which the Court has denied recovery.

CONCLUSION.

Counsel have charged us with refinements, etc. So far as we are concerned, we rely on no refinements. We say that unloading is removing the produce from the truck and that anything after that is carriage or delivery by means other than the truck, which is not covered by the policy; but in view of the contention of appellees, which we deem unfounded, that carriage and delivery after removal from the truck, no matter how remote from the truck, constitute unloading, we make the further contention that even if that were true, which we deny, the incidental act of the person making the delivery when returning after delivery is no part of unloading, is disconnected from the use of the truck, and does not constitute an injury arising out of the use of the truck.

Dated, San Francisco,
June 24, 1940.

Respectfully submitted,
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